

AVOIDING EMPLOYMENT LITIGATION AND OTHER WISHFUL THINKING

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*“If I were king I’d sit beneath our plane tree’s shade
and listen like a father to all my people’s cares,
dispensing bread and freedom justly to all”*

NIKOS KAZANTZAKIS, *THE ODYSSEY: A MODERN SEQUEL* 7 (Simon & Schuster 1958)

“The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.”

GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (Yale 1977)

1. Lest you think this paper is going to degenerate into nearly metaphysical nonsense about philosophy and law, let me quickly make my point (and I hope this explains why I have opened with the quotations above):

The general population broadly believes that law should be both simple and decided based on common shared and intuitive concepts of fairness. They believe that law *should* be as simple as sitting beneath a tree and talking amongst reasonable people, and most people believe that law is really necessary only because of human failures. The important point, for understanding, avoiding, and defending litigation, is to recognize that juries decide disputes based on broadly shared and intuitive concepts of fairness and common sense. If one understands the assumptions and inferences made by juries in deciding disputes, one can far better conduct daily affairs in the workplace to avoid litigation and employment disputes in general, and, failing that, can far better deal with and defend litigation. That is not to say that you can completely avoid litigation (and hence the irony in the title of this paper), but it is to say that far more litigation can be avoided, and far more litigation can be more effectively defended. If one understands why juries decide employment disputes the way they do, and understands their common sense approach, one can distill a remarkably small number of simple principles and guidelines which effectively serve to both prevent employment disputes and defend disputes which have already broken out.

2. The problem is, how in the world do you take such theoretical musings and transform them into *useful* principles that justify your fine organization in asking me to talk to you instead of,

it seems, several billion other attorneys in the universe? Let me chart out my methodology as follows:

- a. We will start with enough “law” background concerning certain types of employment discrimination claims, to set the backdrop for the analysis that follows. I will focus on disability discrimination, age discrimination, and sexual harassment for this backdrop.
- b. I will next try to provide you with useful and tangible guidelines by first starting with actual published employment decisions which discuss when evidence is or is not sufficient to support a finding of employment discrimination.
- c. I will then identify those threads of evidence that supported findings of discrimination, and focus on why the evidence (destroying records, violating a policy) would allow reasonable people to believe that discrimination was a motivation for a particular employment decision.
- d. The process of analyzing and understanding why discrimination may be inferred from various facts then provides a basis for formulating simple and intuitive guidelines for avoiding and defending employment litigation.

I. “The Law”

3. The analysis that follows sets out what a plaintiff has to prove in various types of employment discrimination claims, so you can understand better the evidence that is used or rejected by juries to conclude whether discrimination occurred.

4. It is important to understand initially that, in many areas of law, the motivation of the defendant is largely irrelevant. But the motivation of the defendant is close to the essence of an employment discrimination claim, because the law requires (except for a few narrow situations) that you prove that the employer was motivated by race or sex or disability or age in making a particular employment decision (firing, not promoting, etc.). So a plaintiff really, to some extent, has to get “inside the head” of the defendant in proving a case of discrimination, and the plaintiff generally has to prove that, had it not been for the motivation based on, say, disability, the adverse action would not have been taken by the employer.

5. The analysis that follows is very much in the form of a legal brief, with citations and that sort of stuff. For those of you that need a detailed and technical statement of a particular area

of law, I hope this treatment is helpful. At the same time, I am intentionally trying to contrast how technical and difficult the law may appear, with how intuitively it is resolved by juries in real life.

A. Legal Requirements for Proving Disability Discrimination

1. A Prima Facie Case Under The ADA

a. Prohibited Discrimination Under The ADA

6. The ADA prohibits discrimination against disabled persons:

No *covered entity*^{1/} shall discriminate against a *qualified individual*^{2/} with a *disability*^{3/} because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (emphasis added for defined terms; footnotes added).^{4/} The term “discriminate” includes a failure to provide reasonable accommodation for an employee’s disability, by

- (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would

^{1/} A “covered entity” is defined in 42 U.S.C. § 12111(2), and “employer” is defined at 42 U.S.C. § 12111(5)(A). See below at 4 for the discussion of a “covered entity.”

^{2/} A “qualified individual” is defined at 42 U.S.C. § 12111(8).

^{3/} A “disability” is defined at 42 U.S.C. § 12102(2).

^{4/} The ADA incorporates, 42 U.S.C. § 12117(a), the “powers, remedies, and procedures” provisions of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9. The Civil Rights Act of 1991 modifies and expands the remedies available under the ADA. See 42 U.S.C. § 1981a(a)(2); 42 U.S.C. § 1981a(b) (compensatory damages); 42 U.S.C. § 1981a(c) (jury trial).

impose an undue hardship on the operation of the business of such covered entity; or

- (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant[.]

42 U.S.C. § 12112(b)(5)(A) & (B). The term “discriminate” also includes qualification “standards” that unfairly impact disabled persons, by

using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity[.]

42 U.S.C. § 12112(b)(5).

b. Prima Facie Case

7. The *prima facie* case, as set out in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), and modified in *St. Mary’s Honor Center v. Hicks*, 113 S. Ct. 2743, 2747-49 (1993), has been adapted to the requirements of the ADA. A *prima facie* case under the ADA^{5/} requires that the plaintiff show the following:

- (1) the plaintiff suffers from a disability;

^{5/} In analyzing the ADA, courts have frequently looked to the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* The Rehabilitation Act prohibits discrimination against “otherwise qualified individuals with handicaps in programs that receive federal financial assistance.” *Chandler v. City of Dallas*, 2 F.3d 1385, 1389 (5th Cir. 1389), *cert. denied*, 114 S. Ct. 1386 (1994). The ADA expressly “prevents imposition of inconsistent or conflicting standards for the same requirements” under the ADA and Rehabilitation Act, 42 U.S.C. § 12117(b); *White v. York International Corporation*, 45 F.3d 357, 360 n.5 (10th Cir. 1995); *see also Chandler v. City of Dallas*, 2 F.3d at 1391 (comparing definitions of “disability” in the 2 acts).

- (2) the plaintiff was a “qualified individual”;
- (3) the plaintiff was subject to an adverse employment action; and
- (4) the plaintiff was replaced by a non-disabled person or was treated less favorably than non-disabled employees.

In *Aikens v. Banana Republic, Inc.*, 877 F. Supp. 1031, 1036 (S.D. Tex. 1995); accord *White v. York International Corporation*, 45 F.3d 357, 360-61 (10th Cir. 1995).^{6/} The prima facie case may be proven by direct or circumstantial evidence. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983).

2. Liability Issues

a. A “Covered Entity” Under The ADA

8. The ADA defines a “covered entity” as “an employer, employment agency, labor organization, or joint labor-management committee.” 42 U.S.C. § 12111(2). An “employer” means

A person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for 2 years following the affective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working

^{6/} The Tenth Circuit in *White v. York International Corp.* restated the *prima facie* case in the specific setting of a termination:

- (1) the plaintiff is a disabled person within the meaning of the ADA;
- (2) the plaintiff is qualified, with or without reasonable accommodation, to perform the essential functions of the job; and
- (3) the employer terminated him because of the disability.

45 F.3d at 360-61.

day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

42 U.S.C. § 12111(5)(A).

b. An “Individual With A Disability”

(1) ADA Definitions Concerning “Disability”

9. The ADA defines “disability” as
- (A) *a physical or mental impairment that substantially limits one or more of the major life activities of such individual;*
 - (B) a record of such a impairment; or
 - (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (emphasis added for defined terms). A “physical . . . impairment” means any

any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine[.]

29 C.F.R. § 1630.2(h)(1). “Substantially limits” means

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1320.2(j). “[M]ajor life activities” means “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i).

(2) Requirements For A “Qualified Individual”

10. The ADA prohibits discrimination against a “qualified individual” with a disability, 42 U.S.C. § 12112(a), *see* above at 1, and a plaintiff must prove, as a part of the *prima facie* case, that he or she is a “qualified individual,” *see* above at 3. The ADA defines “qualified individual with a disability as “an individual with a disability who, *with or without reasonable accommodation*, can perform the *essential functions of the employment position* that such individual holds or desires.” 42 U.S.C. § 12111(8) (emphasis added). The regulations promulgated by the Equal Employment Opportunity Commission (“EEOC”) elaborates:

Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of that position.

29 C.F.R. § 1630.2(m) (emphasis in original).

c. Ability to Perform The Essential Functions of His Job

11. Beyond the issue of the “requisite skill, experience, education, and other job-related requirements” for the “senior technician” position, the plaintiff must establish that he or she could perform the job’s *essential* functions, with or without reasonable accommodation. *See* 42 U.S.C. § 12111(8).

(1) ADA Law On Performing Essential Job Functions

12. The Fifth Circuit in *Chandler* addressed the issue of a “qualified” individual under the Rehabilitation Act, and set out a two-step process:

First, we must determine whether the individual could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue. Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable

accommodation by the employer would enable him to perform those functions.

Chandler v. City of Dallas, 2 F.3d 1385, 1392 (5th Cir. 1989), *cert. denied*, 114 S. Ct. 1386 (1994). The critical facts about the definition of a “qualified individual” under the ADA and the *Chandler* decision are: (a) an employee need only demonstrate an ability to perform *essential* job function, so that the employee is not disqualified for an inability to perform *marginal* functions, (b) if the employee can perform essential job function, then the Court need not address “reasonable accommodation,” and (c) if the employee is unable to perform an essential job functions, then the analysis *begins* a consideration of whether reasonable accommodations were available.

(2) What Are Essential Job Functions?

13. The EEOC’s regulations provide a working definition of “essential functions”:

The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential function” does not include the marginal functions of the position.

29 C.F.R. § 1630.2(n)(1) (emphasis in original). The regulations then state the various considerations that should be included in an analysis as to whether job functions are essential:

A job function may be considered essential for any of several reasons, including but not limited to the following:

- (i) the function may be essential because the reason the position exists is to perform that function;
- (ii) the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
- (iii) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

29 C.F.R. § 1630.2(n)(2). The regulations also addresses the types of evidence that may be considered in accessing essential job functions:

Evidence of whether a particular function is essential includes, but is not limited to:

- (i) the employer’s judgement as to which functions are essential;
- (ii) written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) the amount of time spent on the job performing the functions;
- (iv) the consequences of not requiring the incumbent to perform the functions;
- (v) the terms of a collective bargaining agreement;
- (vi) the work experience of past incumbents in the job;
and/or
- (vii) the current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3).

14. The interpretive guidelines from the EEOC,^{7/} attached as an appendix to the EEOC’s ADA regulations, make it clear that an employer must first determine whether *in fact* the employer requires the employee to perform a particular task:

The inquiry into whether a particular function is essential initially focuses on whether the employee actually requires employees in the position to perform the functions that the employer asserts are essential. For example, an employer may state that typing is an

^{7/} The EEOC’s interpretive guidelines, attached as an appendix to its ADA regulations, represent the “Commission’s interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination.” 29 C.F.R. § 1630 appendix at 393.

essential function of a position. If, in fact, the employer has never required any employee in that particular position to type, this will be evidence that typing is not actually an essential function of the position.

APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT, 29 C.F.R. § 1630 appendix at 393, 399 (interpreting 29 C.F.R. § 1630.2(m)) (“EEOC’s Interpretive Guidelines”). The EEOC’s TECHNICAL ASSISTANCE MANUAL on the ADA’s employment provisions similarly stresses that the “first consideration is *whether employees in the position actually are required to perform the function.*” Equal Employment Opportunity Commission, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT II-13 (January 1992) (“EEOC’s TECHNICAL ASSISTANCE MANUAL”) (emphasis in original).^{8/}

15. If the task in question must actually be performed by the employee, then the focus shifts to whether that task could be removed from the employee’s responsibility without “fundamentally alter[ing]” the position. 29 C.F.R. § 1630 appendix at 399; TECHNICAL ASSISTANCE MANUAL II-13.

16. Although a job description “prepared . . . before advertising or interviewing applicants for the job” is evidence of the essential job functions, 42 U.S.C. § 12111(8), the TECHNICAL ASSISTANCE MANUAL makes it clear a job description may not be accurate, and it may contain requirements that are simply not part of the job:

A written job description may state that an employee performs a certain essential function. The job description will be evidence that the function is essential, but if individuals currently performing this job do not in fact perform this function, or perform it very infrequently, *a review of the actual work performed will be more relevant evidence than the job description.*

TECHNICAL ASSISTANCE MANUAL II-15 (emphasis added). Job descriptions should be reviewed to “be sure that they accurately reflect the actual functions of the *current* job.” *Id.* (emphasis added). Job descriptions “written years ago frequently are inaccurate.” *Id.*

17. The TECHNICAL ASSISTANCE MANUAL provides another illustration of how job descriptions can be inaccurate:

^{8/} The EEOC’s TECHNICAL ASSISTANCE MANUAL was specifically required by the ADA, 42 U.S.C. § 12206(b)(3), although the failure to acquire the TECHNICAL ASSISTANCE MANUAL does not “excuse” the employer from the obligations of “compliance” with the ADA, 42 U.S.C. § 12206(e).

A written job description may state that an employee reads temperature and pressure gauges and adjusts machine controls to reflect these readings. The job description will be evidence that these functions are essential. However, if this job description is not up-to-date, and in fact temperature and pressure are now determined automatically, the machine is controlled by a computer and the current employee does not perform the stated functions *or does so very infrequently*, a review of actual work performed will be *more relevant evidence* of what the job requires.

TECHNICAL ASSISTANCE MANUAL II-16 (emphasis added). There is also a critical difference between the *task* and its *purpose*, one the one hand, and the *manner* of performing the task, on the other hand. The physical manner by which the task is performed is *not* the essential job function:

In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the *purpose* of the function and the *result* to be accomplished, rather than the manner in which the function presently is performed. An individual with a disability may be qualified to perform the function, if an accommodation would enable this person to *perform the job in a different way*, and the accommodation does not impose an undue hardship. *Although it may be essential that a function be performed, frequently it is not essential that it be performed in a particular way.*

TECHNICAL ASSISTANCE MANUAL II-16. (emphasis added). As an example, an essential job function of a job on a loading dock may be to “move heavy packages from the loading dock to a storage room, rather than to lift and carry packages from the dock to storage room.” *Id.*

18. The TECHNICAL ASSISTANCE MANUAL addresses the situation where a person has limited lifting capabilities, and other employees take over the task of lifting heavier weights while the disabled employee continues to lift weights up to his limit:

If the checker’s [in a grocery store] disability made it impossible to lift any item over one pound, s/he might not be qualified to perform the essential bagging functions of the new job. But if the disability only precluded lifting items of more than twenty pounds, it might be possible for this person to perform the bagging functions, except for the relatively few instances when items or loaded bags weigh more than twenty pounds. If other employees are available who could help this individual with the few heavy items perhaps, in exchange for some incidental functions that they perform, or if this employee could keep

filled bag loads under twenty pounds, then bagging loads over twenty pounds would not be an essential function of the new job.

TECHNICAL ASSISTANCE MANUAL II-19.

d. What Are Reasonable Accommodations?

19. The ADA defines “reasonable accommodations” as:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) *job restructuring, part time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and any other similar accommodations for individuals with disabilities.*

42 U.S.C. § 12111(9) (emphasis added). The EEOC’s regulations describe three types of “reasonable accommodations”:

(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the positions such qualified applicant desires; or

(ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o); 29 C.F.R. § 1630 appendix at 400 (interpreting § 1630.2(o)). The EEOC’s interpretive guidelines refer to three “types” of accommodations (listed immediately above) but that these are the “most common types of accommodation that an employer” may “be required to provide”, but that there are “any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned in this listing. This listing is not intended

to be exhaustive of accommodation possibilities.” 29 C.F.R. § 1630 appendix at 400. The interpretive guidelines then set out examples:

For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces. Providing personal assistance, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be a reasonable accommodations.

Id.

20. The EEOC’s interpretive guidelines then address job restructuring:

Another of the potential accommodations listed is “job restructuring” [in 29 C.F.R. § 1630.2(o)]. An employer or other covered entity may restructure a job by *reallocating or redistributing non-essential, marginal job functions. For example, an employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires a qualified individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the qualified individual with a disability can perform are made part of the position to be filled by the qualified individual with a disability. The remaining marginal functions that the individual with the disability can not perform would then be transferred to the other position.*

29 C.F.R. § 1630 appendix at 401 (emphasis added).

21. The interpretive guidelines also make it clear that “job restructuring” may encompass shifting the hours at which a particular task is performed:

An employer or other covered entity may also restructure a job by altering when and/or how an essential function is performed. For example, an essential function customarily performed in the early morning hours may be rescheduled until later in the day as a reasonable accommodation to a disability that precludes performance of the function at the customary hour.

Id.

22. The TECHNICAL ASSISTANCE MANUAL addresses the doctor’s role in formulating an employer’s appropriate response, and it makes it clear that the employer cannot shift the responsibility to the doctor to make decisions concerning accommodations:

A doctor who conducts medical examinations for an employer should not be responsible for making employment decisions or deciding whether or not it is possible to make a reasonable accommodation for a person with a disability.

The doctor’s role should be limited to advising the employer about an individual’s functional abilities and limitations in relationship to job functions, and about whether the individual meets the employer’s health and safety requirements.

Accordingly, employers should provide doctors who conduct such examinations with *specific* information about the job, including the type of information indicated in the discussions of “job descriptions” and “job analysis” in Chapter II [of the TECHNICAL ASSISTANCE MANUAL].

TECHNICAL ASSISTANCE MANUAL VI-9 (emphasis in original).

23. After going into substantial detail above about disability discrimination, I hope I have made my point about how technical and “hard” the law can appear to be. As I will explain below, that difficulty and technicality *on paper* (or out of the mouths of lawyers) has little to do with how juries decide cases *at the courthouse*. I will follow with a brief discussion of what you have to do to prove a case for age discrimination and sexual harassment.

B. Legal Requirements for Proving Age Discrimination

24. To prove a “prima facie” case of age discrimination, a plaintiff must prove the following (and I have placed the facts in a setting of a discharged employee):

- employee was discharged;
- employee was qualified for the position;
- employee was within the protected class at the time of the discharge; and

- employee was either (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age.

Rhodes v. Guiberson Oil Tools, 1996 U.S. App. LEXIS 1464, 69 F.E.P. Cases 1720 (5th Cir. January 31, 1996) (en banc) (vacating *Rhodes v. Guiberson Oil Tools*, 49 F.3d 127 (5th Cir. 1995)); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993); see also *O'Connor v. Consolidated Coin Caterers Corporation*, ___ U.S. ___ (April 1, 1996) (not necessary for plaintiff to prove that he was replaced by someone outside of the protected class; assumes without deciding that McDonnell-Douglas prima facie case framework is applicable to ADEA).

C. Legal Requirements for Proving Sexual Harassment

25. Sexual harassment comes in 2 types, “hostile work environment,” where the employer is subjected to unwelcome sexual misconduct that unreasonably interferes with job performance, but where no tangible job benefit (salary, promotion, etc.) is lost; and “quid pro quo” harassment, where acceptance of the harassment becomes a condition to the employee’s receipt of certain job benefits (raise, promotion, etc.).

1. “Quid Pro Quo” Sexual Harassment

26. “An employer may not require sexual consideration from an employee as a quid pro quo for job benefits.” *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982). The elements of this type of claim are:

- (1) The employee belongs to a protected group.
- (2) The employee was subject to unwelcome sexual harassment.
- (3) The harassment complained of was based upon sex.
- (4) The employee’s reaction to harassment complained of affected tangible aspects of the employee’s compensation, terms, conditions, or privileges of employment.
- (5) The existence of respondeat superior liability.

Id. at 909; *Ewald v. Wornick Family Foods Corp.*, 878 S.W.2d 653, 658-9 (Tex. App.—Corpus Christi 1994, no writ).

27. “In a quid pro quo sexual harassment action, an employer is held strictly liable for the conduct of supervisory employees having plenary authority over hiring, advancement, dismissal, and discipline under the theory of respondeat superior. *Id.*, at 659.

2. “Hostile Work Environment” Sexual Harassment

28. A hostile environment claim involves the following elements:

- (1) The employee belongs to a protected group.
- (2) The employee was subject to unwelcome sexual harassment.
- (3) The harassment complained of was based upon sex.
- (4) The harassment complained of affected a term, condition, or privilege of employment.
- (5) The employer knew or should have known of the harassment and failed to take remedial action.

Ewald v. Wornick Family Foods Corp., 878 S.W.2d 653, 659 (Tex. App.—Corpus Christi 1994, no writ).

II. Why Employers Failed: Recent Court Decisions on What Constitutes Sufficient Evidence to Support a Finding of Discrimination

29. There are 2 recent decisions from the U.S. Court of Appeals for the Fifth Circuit (“Fifth Circuit”) that discuss in detail what evidence may or may not be sufficient to support to finding of discrimination. The most important one is *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), which overruled a prior opinion from the Fifth Circuit that reversed a jury verdict in favor of a plaintiff and had imposed an extraordinarily difficult standard on plaintiffs (and great for employers) for proving discrimination in employment.

30. The second decision from the Fifth Circuit is *Polanco v. City of Austin*, 1996 U.S. App. LEXIS 5627 (5th Cir. March 28, 1996), which affirmed or upheld a jury's verdict in favor of the plaintiff.

31. I will discuss these cases, and principles growing out of them, in some detail in the lecture. I will eventually fill in this portion of the paper from my lecture notes, and please feel free to contact me to get a finished copy of the paper.

III. Analyzing the Jury's Assumptions and Inferences Where They Find That Discrimination Occurred

32. I will discuss in the lecture specific items of evidence (such as destroying documents, violating company policy), according to the following structure:

- What is the evidence that arguably supports a finding of discrimination? It might be destruction of a document, violating a policy, lying to an employee, imposing unusually harsh requirement on a particular employee, etc.
- Why would a reasonably person believe that the evidence supports a finding of discrimination?
- What assumptions did the jury make, or what thought processes were involved?
- How do you avoid or rebut the inference that the jury made?

IV. Guidelines for Avoiding Employment Disputes and Effective Handling Litigation

33. I will discuss in the lecture my suggestions for basic principles or guidelines to employ in conducting workplace affairs with an eye toward avoiding disputes, and putting your company in the best possible position should a dispute occur. The guidelines are remarkably simple and intuitive, and get us back to something approaching the opening quote in this paper, that law ought to be as simple as sitting beneath a tree and talking with other reasonable people—that is what the jury would want the law to reflect, and the jury's opinion is close to the only thing that counts.

V. Conclusion

34. This paper is still a “work in progress,” and I have not yet had a chance to flesh out on paper many of the thoughts that I gave you in my lecture. Those thoughts will be filled in to sections II, III, and IV above. If any of you would like to get a copy of the finished paper, please feel free to call, e-mail, or write me, and I would be happy to send out the finished article to you.

35. Thanks again for inviting me to speak, and I hope the paper and lecture have been helpful. I would welcome any feedback you might have. Feel free to give me a call.